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SUPREME COURT OF THE UNITED STATES.

No. 459.—October Term, 1927.

Republic of France, Compagnie Franco-Indochinoise and Engineering Timber Company, Ltd., Petitioners, vs. French Overseas Corporation, as owner of the Schooner *Malcolm Baxter, Jr.*	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 21, 1928.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioners, in July, 1917, shipped a cargo on the Schooner *Malcolm Baxter*, owned by respondent, from New Orleans to Bordeaux, and prepaid the freight. The bill of lading stipulated "prepaid freight is to be considered as earned in shipment of goods and is to be retained by vessel's owner . . . if there be forced interruption or abandonment of the voyage, at a port of distress or elsewhere." In addition there was the usual clause exempting the vessel from "restraints of princes, rulers and peoples."

After departure from New Orleans the *Baxter* developed leaks due to unseaworthiness which caused her to put in at Key West, where she was surveyed. In order to effect the necessary repairs she was towed to Havana where she was unladen and repaired, remaining there for that purpose until January 14, 1918. Before the completion of the repairs the United States Export Administrative Board put into effect its ruling of November 18, 1917, that sailing vessels would not be permitted to clear for points beyond the war zone. This ruling remaining in force when the repairs were completed, and the *Baxter*, being unable to secure a clearance for Bordeaux, took her cargo on board and proceeded to New York, where the petitioners libelled the vessel in the district court for southern New York to recover freight money, damages to cargo and damages for failure to perform the contract voyage from New Orleans to Bordeaux.

Respondent as owner filed a petition for exoneration and limitation of liability and enjoined further proceedings on the libels. Petitioners filed claims in the limitation proceedings, claiming damages as in the original libels, setting up the deviation and the abandonment of the voyage, by reason of the ship's unseaworthiness on sailing.

The district court denied the petition to limit liability, allowed the claim for freight money and for damages sustained by petitioners, including damage to cargo. A special master, appointed to take proof of damage, found that the measure of damages was the excess cost of the substituted carriage and incidental expenses, and in the case of goods which could not be sent forward the damage was measured by the difference between the value of the goods at the time when and in the condition in which they should have arrived at destination, and their value at the place where and in the condition in which they actually were received, less charges saved plus incidental expenses. Final decree was given to the petitioners for the damage as found.

The court of appeals for the second circuit upheld the ruling of the district court denying exoneration and limitation of liability but reversed the judgment, holding there could be no recovery of the prepaid freight or excess cost of transportation over prepaid freight; that the recovery of damages must be limited to actual damages to cargo resulting from unseaworthiness, and the difference between the value of the cargo had it arrived in Bordeaux on a straight voyage on August 16, 1917, the date when the *Baxter* sailed, and on a voyage leaving Havana January 14, 1918, the date when the repairs were completed and the *Baxter* was ready for sea. The *Malcolm Baxter, Jr.*, 20 F. (2d) 304.

Both courts below agreed that the *Baxter* was unseaworthy on sailing and that respondent failed to exercise due diligence to ascertain her condition before sailing. This was sufficient ground for denying the petition for exoneration and limitation of liability under the Harter Act, Act of February 13, 1893, c. 105, 27 Stat. 445, and acts permitting limitation of liability to the vessel and pending freight. R. S. §§ 4282-4289. The correctness of this determination is not raised on the petition here. *Federal Trade Commission* v. *Pacific Paper Ass'n*, 273 U. S. 52, 66, but petitioners urge that the *Baxter's* putting in first at Key West and later at Havana must be deemed a voluntary deviation because due to the

negligence of the owner in failing to discover the unseaworthiness and to make the vessel seaworthy before sailing.

Unseaworthiness alone or deviation caused by it displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness. *The Caledonia*, 157 U. S. 124; *The Europa*, [1908], P. 84. *Thorley* v. *Orchis S. S. Co., Ltd.*, [1907], 1 K. B. 660; *Kish* v. *Taylor*, [1912], A. C. 604, 618. But if the deviation here is to be classed with voluntary deviations, respondent may not claim the benefit of the clauses of the bill of lading and is responsible for the cargo as insurer. *The Willdomino*, 272 U. S. 718; *St. Johns Corp.* v. *Companhia Geral, etc.*, 263 U. S. 119; *Mobile & Montgomery Ry.* v. *Jurey*, 111 U. S. 584; *Lawrence* v. *Minturn*, 17 How. 111; and see *The Indrapura*, 171 Fed. 929. In any case it is contended that respondent's negligent failure to discover the unseaworthiness of the vessel resulted in the delay which brought her within the operation of the embargo, and that the shipowners are for that reason liable for damages for all the delay, including that immediately resulting from the embargo.

Respondents had purchased the vessel about one month before she sailed. At that time she was unseaworthy, due to a hog or camber in her keel, a structural weakness dangerous to the ship in heavy weather, which later caused the leak and made necessary the repairs at Havana. Following the purchase and before sailing from New Orleans a survey was made by the owner, which appears not to have disclosed her condition, but both courts below agree that the fact of her unseaworthiness could have been discovered by due diligence.

The evidence supports the finding of the court of appeals that the master of the *Baxter* "did not leave New Orleans with knowledge that he would have to make port for repairs, and honestly thought he could make the trip in safety and tried unsuccessfully to do so." The case is therefore not one where the master set sail with the knowledge that the deviation from the voyage, as described in the bill of lading, would ensue, and with the purpose and intent to deviate as in *The Willdomino*, *supra*. There the officers of the vessel, under direction of the owner, sailed from Ponta Delgada, bound for New York, all knowing that the supply of fuel was insufficient for the voyage and intending to take the vessel to North Sidney, and we held that the deviation under the circumstances was voluntary and inexcusable.

But here the deviation was not voluntary and the point to be determined is whether a like effect is to be given to a deviation to avoid perils of the sea, where the deviation would not have been necessary if the owner had used reasonable diligence to start the voyage with a seaworthy vessel.

No sufficient reason is suggested to us for thus extending the rule, nor do we perceive any. Petitioner, without resort to it, is entitled to recover all damages caused by the unseaworthiness. The basis of the privilege of deviation to avoid perils of the sea, is humanitarian. See Carver, Carriage by Sea, (7th ed.) §§ 291, 292. To hold that the master whose ship is in a perilous position must choose between the hazard of continuing the voyage and gaining safety only by forfeiting the contract of affreightment would be a departure from that principle for no purpose except to give the shipper an added and unnecessary protection. "It is the presence of the peril and not its cause" which justifies the deviation. See *Strong* v. *Scott*, 14 App. Cas. 801. This is the conclusion reached in other circuits. *The Turrett Crown*, 297 Fed. 766; *The Turret Crown*, 284 Fed. 439, 445; *The Turret Crown*, 282 Fed. 354, 360; see *The Thessalonia*, 267 Fed. 67; and by the House of Lords in *Kish* v. *Taylor*, *supra*, holding that a deviation caused by unseaworthiness due to improper and negligent loading of the ship by the master did not displace the bill of lading. This rule we adopt as most consonant with the reason and consequences of the rule that a voluntary deviation displaces the contract of affreightment. It follows that the clauses of the bill of lading remain effective and that petitioner may not recover the freight money. *Allanwilde Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377.

But for all damages legally attributable to the breach of warranty of seaworthiness petitioners may recover. *The Caledonia*, *supra*. For the delay caused by the embargo alone petitioners may not recover, both because it was within the exception of the bill of lading and because, while it continued, performance of the contract of affreightment would have been illegal. See *Allanwilde Corp.* v. *Vacuum Oil Co.*, *supra*, 385; Carver, Carriage by Sea, (7th ed.), §§ 237, 238, 343, 344.

It was the embargo and not the unseaworthiness of the vessel which delayed the voyage after the *Baxter* was repaired and ready for sea on January 14, 1918, and the unseaworthiness of the vessel did not cause the embargo. But it is urged that it is enough to

sustain the recovery for the failure to complete the voyage that it was the unseaworthiness, for which respondent was responsible, that brought the vessel within the excepted peril. This view, although not without support, *Green-Wheeler Shoe Co.* v. *Chicago, Rock Island, & Pac. R. R.*, 130 Iowa 123; *Michaels* v. *New York Central R. R.*, 30 N. Y. 564; *Condict* v. *Grand Trunk Ry.*, 54 N. Y. 500, does not generally prevail. See 2 Williston, Contracts, § 1906, and cases cited.

It was rejected by this Court in *Railroad Co* v. *Reeves*, 10 Wall. 176. There negligent delay in the transportation of goods by the carrier brought them within the path of a flood, which caused their destruction. The court held that the flood and not the negligent delay was the proximate cause of the damage and that the rule *causa proxima non remota spectatur* applied to contracts of common carriers as to others. There has been no departure from this rule and we see no reason for departing from it now. See *Milwaukee & St. Paul Ry.* v. *Kellogg*, 94 U. S. 469; *Atchison, Topeka & Santa Fe Ry.* v. *Calhoun*, 213 U. S. 1; *The Indrapura, supra; The Lusitania*, 251 Fed. 715, 732; *The Turret Crown*, 282 Fed. 354, 360. There is no finding, nor is it suggested, that at the time when the contract of affreightment was entered into, or when the vessel broke ground, that the embargo could reasonably have been foreseen, or that there were any special circumstances charging petitioners with the knowledge or expectation that the unseaworthiness or consequent delay would bring the vessel within its operation. The respondent, having brought itself within the exception under its bill of lading, the burden is on petitioners to show that respondents' negligence was the cause of or contributed to the loss. *Railroad Company* v. *Reeves, supra*, 190; *Transportation Co.* v. *Downer*, 11 Wall. 129; see *Southern Ry.* v. *Prescott*, 240 U. S. 632, 641; *Kohlsaat* v. *Parkersburg & Marietta Sand Co.*, 266 Fed. 283, 285.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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June 23
Aug 17

2. Maritime Hand ~~Campbell~~ ~~not hearing~~ Motion for C & S Dft.

Pltf purchased schooner Malcolm Baxter Jr. which was on New Orleans loading malt tobacco etc. prep'd papers & clears for carriage to Bordeaux in July 17. Rep made an inspection of vessel. Aug 16, 17 she sailed from New Orleans, while waiting at Port Eads mast was discovered. Master decided to proceed to Atlantic seaboard. Storm arose & 5 sails in stay were lost. Sept 1 17 for repairs & was in yard there he was towed to Havana where repairs were completed as soon as possible Jan 7, 18. Sept 29 17 US issued embargo to Bordeaux. ~~Owner~~ Cargo then notified vessel sailed for US Jan 4, 18. was another leak. Steel, lumber & tobacco were restuffed frames, stanch & malt were sold at N.Y.

Pltf filed libels for damages for failure to perform cont.

Respt filed pet. for limitation of and exoneration

pets & others for carriage to Bordeaux on July 17.
Resp made an inspection of vessel. Aug 16, 17 she
sailed from New Orleans, while waiting at Port
Eads a leak was discovered. Master decided to proceed
rather than return. It grew worse & 655 miles on
Atlantic W.S.W. bound Sept 1 17 for repairs as was no yard
there he was towed to Havana where repairs
were completed as soon as possible from 9/18. Sept 29 17
U.S. issued embargo to Bordeaux. ~~Owner~~ Cargo
then notified & vessel sailed for Key West 4/10.
was another leak. Steel, lumber & Tobacco were
discharged from Key, Starch & malt were sold at K.W.

Pets filed libels for damages for failure to perform cont.

Resp filed pets for limitation of and exoneration
from liabilities.

Pets claimed abandonment of voyage due to
unseaworthiness & resultant impossibility.

L/R 301) was ruled in by Am. Bur. of Shipping.
Master left N.O believing it unseaworthy, & found considerable
leak & trouble on ent journey that she was
unseaworthy when she left N.O

Owners did not take proper precautions, denied pet to limit liab
Failed to examine properly.

Boat failed in warranty of seaworthiness
This caused frustration of voyage ; & Pet liable even
tho another cause of frustration intervened
Recover damages from this breach & Freight paid

CCA Findings as to unseaworthiness sustained &
petition to limit liab properly denied & is liable for
consequences of br of warranty of seaworthiness

Boat was on voluntary deviation in making port.
Was not proc. neg. When she left H.O deviation was not
excusable, delay resulted from br of warranty; but
when she was repaired voyage was frustrated by
embargo; not a result of unseaworthiness so that
terms on bill (restraint of princes) apply & no damages
can be allowed on acct of embargo or recovery of prepaid
freight; but for actual damage to walter-starch; & for
diffs between value of goods had they arrived on
stated voyage leaving H.O. Aug 16'17 & on a voyage
leaving Havana Jan 14, 18

Pat. Unseaworthiness not an embargo cause of loss - ~~not ready~~ should have gone before embargo but for unseaworthiness ; so in importation & set up embargo.

Unsecreated

Henry W Camp v Rosario

3 Ruffin Woolley Davis

Puerto Rico, D.C. ch held recovery allowed ret 1/2 fr. + ins. prem - 154.750

Consigned

went from Italy to Norfolk ~~for~~ recovery

shown for goods to Norfolk & C.C. held embargo warranty. she herself wrongly seized - cannot set up as insd. Embargo was consequence of detention.